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In The

Supreme Court of the United States

October Term, 1976

HAZELWOOD SCHOOL DISTRICT; C. O. McDONALD, Superintendent; ROBERT BISCHOF, ROBERT COLEMAN, DOROTHY SMITH, CHARLES SWEENEY, DONALD MATTOX and MILTON STRAUSS, Members of the Board of Education of the Hazelwood School District,

Petitioners.

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. THE COURT OF APPEALS ERRED IN DISREGARDING EVIDENCE THAT HAZELWOOD TREATED ITS ACTUAL JOB APPLICANTS IN A NON-DISCRIMINATORY MANNER AND RELYING ON UNDIFFERENTIATED WORKFORCE STATISTICS TO FIND AN UNREBUTTED PRIMA FACIE SHOWING OF A PATTERN OR PRACTICE OF EMPLOYMENT DISCRIMINATION.

The second of two questions presented by petitioners is whether a court may disregard evidence that an employer has treated job applicants in a nondiscriminatory manner and rely on undifferentiated workforce statistics to find an unrebutted case of employment discrimination in violation of Title VII of the Civil Rights Act of 1964.

That, we submit, is a question of law. It is a question of what sort of evidentiary showing satisfies Title VII. It requires some consideration of the record, to be sure. But it is not such a question as implicates the "clearly erroneous" rule or justifies assertions that these petitioners "misconceive the role of a reviewing court in a Title VII case" and are making some new and belated response to an established Government prima facie case. (Gov't Br. 17.)[1] The question is whether on the evidence of record an unrebutted prima facie case was established.

The Government and its supporting amici do not overtly dispute the proposition that comparative workforce statistics such as were relied upon by the court of appeals must yield to applicant flow data if the latter are reliable. There should be no doubt of that proposition as a matter of logic and law. A comparison of the racial composition of an employer's workforce with the racial composition of a relevant labor market may be appropriate in a Title VII case if there is no evidence of how the employer treated actual applicants for jobs or if the employer has distorted the racial composition of its pool of applicants by intentionally encouraging or discouraging applications from one group or another. But where reliable, undistorted applicant flow data are available, they are the best evidence of whether the employer has discriminated in its hiring.

[1] The assertions, which are recurrent both in the Government's brief and in the briefs of the amici, are in any event odd, given the posture of this case. The district court tried the facts and decided for petitioners and was reversed by the court of appeals. If the findings of any court are entitled to the benefit of the "clearly erroneous" rule, they are the findings of the district court. McAllister v. United States, 348 U.S. 19 (1954). And if the role of a reviewing court has been misconceived in this case, the misconception is that of the court of appeals, which acknowledged that it was acting extraordinarily when, having corrected what it considered an error of law on the part of the district court, it made certain findings on its own rather than leaving factual findings to the district court on remand. (Pet. App. B 16b.)

Instead of disputing this proposition, the Government and the amici have attempted to deny its relevance. It is this attempt, forecast in the brief in opposition, that made it necessary for us to examine the record in some detail in our opening brief. For the Government and the amici say that (1) direct evidence as to how Hazelwood treated black applicants for teaching jobs does not exist in the record or is unreliable, and (2) the workforce statistics were not the only evidence that the court of appeals relied upon in finding that Hazelwood had violated Title VII. We demonstrate in Part A, immediately below, that there is in the record reliable evidence permitting comparison of Hazelwood's treatment of black applicants for teaching jobs with its treatment of applicants generally and, even making full allowance for any possible gaps in the evidence, the record shows that black applicants were treated at least as favorably as applicants generally. In Part B we demonstrate that the linchpin of the court of appeals' decision is the comparative workforce statistics and that other evidence of record cannot sustain the decision when those statistics (which are in any event defective) are made to yield to the better, more direct evidence of Hazelwood's actual treatment of applicants.

A. The Evidence Established That Hazelwood Treated Its Actual Job Applicants in a Nondiscriminatory Manner.

Neither the Government nor any of the amici denies that reliable applicant flow data — evidence as to how Hazelwood dealt with all its job applicants, black and nonblack — would provide the best indication of whether Hazelwood discriminated against black applicants. They assert rather, in the Government's words, that "reliable evidence of that nature is not available." (Gov't Br. 25; see also *id.*, 26-27.) In so asserting, they do not question the accuracy and reliability of the evidence of record establishing

the number of applicants of all races for teaching positions at Hazelwood in certain years and the number of hirings in those years. (Pet. Br. 47.) They say that the Government's evidence of 52 unsuccessful black applicants in the relevant years (Pet. Br. 48) is incomplete and that the number may not be a true index to the demand among blacks for jobs at Hazelwood.

There is no reason to believe the Government's showing is incomplete in any material respect. In the compilation of the key Government exhibit, Pl. Ex. 49, all of Hazelwood's applicant files and other employment records were searched by the FBI, which copied at least 70,000 documents (Tr. 297) and then, using information from the records and other sources, sought out rejected black applicants; it located several whose application forms were not submitted in evidence (Gov't Br. 26 n.23). Exhibit 49 resulted from these efforts of trained investigators and not, as the Government asserts on brief (Gov't Br. 26), from the attempt of a single Justice Department analyst to spot black colleges and other aids to racial indentification on application forms. The analyst's testimony that is quoted by the Government (*id.* n.22) concerned a separate matter, her identification of blacks among those who had been employed by Hazelwood. She testified repeatedly that in the compilation of Exhibit 49, in which the experience of unsuccessful black applicants is depicted, she "was given a list of persons who applied to the Hazelwood School District that I was told were black." (Tr. 243; see also Tr. 229, 279, 293, 304.)

It is true that the Government's trial counsel said in his opening statement that it had not been possible "to obtain facts on all or probably most black applicants" for teaching jobs at Hazelwood. (Gov't Br. 26-27.) When counsel's remarks are quoted in full (see LDF Br. 11), they cast a wholly different light. From counsel's complete remarks, it is clear that, while it may be reasonable to suppose that not quite all black applicants were identified, counsel's

statement that "probably most" were missing was hyperbole. Counsel gave as the reasons why the Government's data on black applicants were incomplete "the district's actions severely restricting the pool of available qualified black applicants and its practice of destroying application files after one year . . . ." (Tr. 9.) The first reason for the alleged incompleteness of the data is no reason at all; Hazelwood did not restrict the number of black applicants (see pp. 6-8, *infra*), and the fact that in counsel's view there were not as many black applicants as there might have been has nothing to do with whether all the black applicants could be identified. The second reason, given the timing of the Government's search of Hazelwood's files, can refer only to applications made in 1971 and not at all to applications for the 1972-73 and 1973-74 school years, the first full school years in which Hazelwood was subject to Title VII.[2]

The relevant evidence indicates that, in fact, the 52 individuals identified in Exhibit 49 as unsuccessful applicants are nearly all of the blacks who applied but were not hired as teachers by Hazelwood during the 1971-74 period. Among the 52, nine were interviewed for jobs and 43 were not. (See also Pet. Br. 67-68.) The evidence establishes that very few, if any, unsuccessful black applicants not included in the 52 were interviewed in 1971 or later. The Government introduced the deposition testimony of all 23 of Hazelwood's principals. Each was asked to identify all

[2] There is no reason to believe there were significant numbers of 1972-73 black applicants unaccounted for. Addendum A to this reply brief shows that about the same number of black applicants were identified for 1972-73 as for 1973-74.

The district court noted that Hazelwood "had retained personnel records" for 1972-73 and 1973-74. (Pet. App. A 7a.) After the Government was first given access to Hazelwood's files in October 1972, old applications were not discarded. Thus, when the FBI photographed Hazelwood's files in the summer of 1973, those files included the applications for both the 1972-73 and 1973-74 school years.

the black applicants he had ever interviewed. The responses, which are collected in Addendum B to this reply brief, cover a period dating back to perhaps 1967 and include the names of 20 persons who were hired, two who were recommended but did not come to work and seven who were not recommended for employment, and references to a very few persons whose names the principals could not recall. There cannot be any significant number of blacks, not already identified by name on this record, who were rejected for teaching jobs after being interviewed.

If, then, other unknown blacks have applied unsuccessfully for jobs at Hazelwood, they were not interviewed. There is no reason to think any such applicants were intentionally denied interviews, since Hazelwood's personnel director could not have identified blacks whom the FBI could not identify.

Addendum A to this reply brief is a revision of the calculations made at pages 47-48 of our opening brief. It counts twice those black applicants who applied in one year and may have renewed their applications for another year and also makes allowance for any possibly missing 1971 applicants. It shows, just as the original calculation did, that on realistic assumptions as to how many black applicants may be missing from the record, blacks were hired at up to twice the rate of hire for applicants generally and that, even if one assumes quite unrealistically that fewer than half the black applicants appeared in the record, blacks were hired at about the same rate as applicants generally. Thus, what the figures of record show as to Hazelwood's treatment of black applicants should not be rejected merely because they may not be precise.

When the successful and unsuccessful black applicants for teaching positions at Hazelwood in the early 1970's are all counted, the total is undeniably a small one. Contrary to

the assertions of the Government and certain of the amici (Gov't Br. 27-28; LDF Br. 12), however, there is no evidence that the smallness of the number is a result of Hazelwood's discouraging applications from blacks. Certainly there is no direct evidence of discouragement. Twenty-five black applicants for teaching positions testified at the trial. None testified that Hazelwood had a bad reputation among black students preparing for careers in education or other potential black teachers. None testified to any other facts from which discouragement of black applications could be inferred.[3] By the hiring years at issue in this case, advances in the law, increased integration of college student bodies and the knowledge that Hazelwood was hiring blacks had surely dissipated any lingering effects of a 1962 "white only" advertisement, the use up until that same decade-past year of an application form requesting racial identification and Hazelwood's concentration, when recruiting was still called for in the 1960's, on colleges that were not predominantly or traditionally black. It should occasion no surprise that, although Hazelwood's doors are open on an impartial basis, there are only a relative handful of black teachers at Hazelwood and that, although offers were made earlier (App. 52-53), there were no black teachers until 1969. The area served by Hazelwood has been very predominantly white in its population, as demonstrated by the racial composition of its student enrollment.[4] The blame for that situation, if blame there be, is not

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[3] On the contrary, the evidence is that some black applicants go out of their way to inform Hazelwood of their race. Thus, Georgia Shaw attached a photograph to her application (App. 394), and Delores Penton telephoned the district's personnel director to inform him she was black (Tr. 179). Another applicant wrote across his application, "I am black." (Pet. App. B 26b n.8.)

[4] The Government (Gov't Br. 9) ascribes to Hazelwood a defense suggested by the district court's remarks that the proportion of black faculty members approximately coincided with the proportion of black

(continued)

upon the governors of the Hazelwood schools. *Compare United States* v. *City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). The complaint did not allege and the Government did not attempt to prove that the racial makeup of the communities served by their schools was an element of their violation of Title VII.

B. Reliance on Comparative Workforce Statistics Is Essential to the Decision of the Court of Appeals; and Absent Such Statistics, the Evidence Does Not Support a Finding of a Pattern or Practice of Discrimination.

The Government and the amici emphasize evidence other than the comparative workforce statistics by way of minimizing the extent of the court of appeals' reliance on the latter. There is no doubt that the court of appeals in its opinion did refer to the incidents in Hazelwood's history that we have just mentioned and to its hiring methods and discussed Hazelwood's treatment of 16 black applicants as to whom the court said that there had been discrimination.

We submit that, on any fair reading of the court of appeals' opinion, the comparative workforce statistics were what was essential to the court's decision that Hazelwood had engaged in a pattern or practice of discrimination. Indeed, in none of the opposing briefs is it urged in so many words that it would be possible to find Hazelwood liable in the absence of the statistical comparison between the proportion of black teachers on Hazelwood's faculty and

[4] (continued)
students (Pet. App. A 19a). Hazelwood never took the position that this rough equivalence demonstrated conclusively that it had not discriminated in the hiring of faculty, and of course there is nothing in Hazelwood's position or the evidence of record that in the slightest supports the amicus ACLU's wild assertion that there was a quota on black teacher hiring related to the proportion of black students in the student body (ACLU Br. 12).

the proportion of black teachers in a supposed labor market.

In case there is any doubt, we respond briefly below to the treatment of the other evidence in the opposing briefs and to their attempts to defend the workforce comparison despite the defects we have pointed out. In the end, as we hope will have been made clear, the comparative workforce statistics remain as the essential center of the court of appeals' decision. Having such a core, the decision must collapse, because reliable direct evidence of the comparative treatment of actual black and nonblack job applicants is available and demonstrates that Hazelwood has not discriminated against blacks, whatever the flawed workforce comparison might indicate.

1. Remote Pre-1972 Events Do Not Establish Post-1972 Discrimination.

The incidents from Hazelwood's history have been thoroughly discussed. The important point is that the record reveals no connection between Hazelwood's present hiring practices and the "white only" advertisement, the old application forms and the former recruiting trips. In the absence of something like the workforce statistics, pre-1972 events cannot prove post-1972 discrimination.[5]

[5] We note here the lengths to which the Government goes in trying to make of our argument something it is not — an argument as to the facts that is somehow foreclosed by the "clearly erroneous" rule. Of the "white only" newspaper advertisement that ran in Jackson, Mississippi, in 1962 (the same advertisement ran without the "white only" phrase elsewhere, see App. 72, 74) the Government says that the "court of appeals specifically found that 'Hazelwood placed' the advertisement (Pet. App. 9b)" and that Hazelwood "does not contend that this finding is 'clearly erroneous.' " (Gov't Br. 18 n.14.) The district court, the court to whose findings the "clearly erroneous" rule might have some relevance, thought the newspaper advertisement incident not worth mentioning. And despite the Government's characterization, the court of ap-
(continued)

2. Hazelwood's Hiring Methods Are Not Evidence Of Discrimination Absent A Showing — Not Made Here — That They Operated To The Disadvantage Of Black Applicants.

The court of appeals said that it considered the statistical evidence of a disparity between the proportion of blacks in Hazelwood's workforce and the proportion of blacks in the relevant labor market "in light of Hazelwood's hiring procedures involving the use of vague and subjective criteria . . . ." (Pet.App. B 14b; see also *id.* at 11b-12b.) Hazelwood's hiring procedures, characterized with a number of different pejoratives by the Government and the amici, obviously are not, standing by themselves, proof of discrimination. Were the procedures what the opposing parties try to make them out to be, they might be susceptible to being used to discriminate, but their mere existence cannot logically prove discrimination. And there is no indication of discriminatory manipulation of the hiring process in the record. By the express statements of the court of appeals, the existence of the questioned hiring procedures was something that shed light on the statistics — no more.

In fact, the record shows that blacks are not excluded in disproportionate numbers in either the process of referral for interviews or the process of interview-and-evaluation itself.

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[5] (continued)
peals made no "finding," resolved no conflicts in the evidence; at the page cited by the Government it recited "evidence" that "Hazelwood placed newspaper advertisements for 'white only' teachers in 1962 . . . ." (By no account was there more than one such advertisement.) For what it is worth, earlier, in its statement of "Hazelwood's record on minority hiring," the court described the advertisement incident neutrally, without stating that Hazelwood was responsible for the "white only" phrase. (Pet. App. B 3b).

The process by which applicants are selected for interviews is designed to reduce an unmanageably large number of applicants to a series of small groups, created one at a time in response to the occurrence of vacancies. In selecting applicants for interviews, the personnel director accords some preference to those most likely to be available. Thus, an applicant who visits or telephones Hazelwood from time to time increases his or her chances of being referred for an interview.[6] The personnel director screens application forms to determine that each referred applicant possesses — or, as in the case of a college senior, is eligible for — a Missouri teacher's certificate.[7] The personnel director makes no other distinctions, endeavoring merely to find the requested number of minimally eligible applicants for each interview request.[8]

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[6] For example, applicant Reid visited the district several times and was offered a position (which she declined) after her second interview. (Tr. 187; see App. 30.)

[7] The Government inexplicably now contends that Hazelwood treated black college seniors differently, denying them interviews (and therefore jobs) because they lacked Missouri certification, while interviewing nonblacks who had yet to graduate (Gov't Br. 45; see also Lawyers' Comm. Br. 6). Hazelwood never contended that Missouri certification was a prerequisite to an interview, and did not reject any applicants for that reason. (See Hord dep. 10.) While the district court, in its decision issued one year after trial, was apparently under that impression (Pet. App. A 12a, 16a), it was wrong.

[8] The evidence does not disclose where in Hazelwood's hiring process the district's former (and successful) student teachers are accorded a preference. While the district's principals may prefer to hire such persons — all other factors being equal — the fact that two black former student teachers were not referred for interviews does not establish that Hazelwood departed from its policy when blacks were involved. There is no evidence at all as to what proportion of nonblack student teachers suffered precisely the same fate amid the flood of applications. The suggestion that Hazelwood favors only nonblack student teachers (Gov't Br. 7 n. 9, 59; Lawyers' Comm. Br. 18) is without support in the record. We do not contend that the referral system works with mechanical perfection — only that it functions without racial motivation or effect.

There is, in short, nothing to suggest that race plays any role in the selection of applicants to be interviewed. Approximately 40 percent of black applicants were interviewed. (Pet. Br. 68.) There is no reason to believe that this proportion is substantially different from that for all applicants, and accordingly there is no reason to suspect the operation of either a mechanism of purposeful racial exclusion or one that produces an unintentional racial disparity.

Blacks fare so well in the second hiring step — the interview-and-evaluation process — that one would, on the basis of statistics alone, suspect the operation of a process that favors rather than excludes them. Job offers were made to approximately 70 percent of blacks who were interviewed (Pet. Br. 74),[9] a much higher percentage than appears to have obtained for nonblacks. And the court of appeals held that, of the seven identified blacks who were interviewed but rejected, five suffered no discrimination.

Ironically, it is the interview process that has drawn most of the pejoratives. The criticism has been only slightly muted by the realization of what has just been said about blacks' relative success in the interview process. Of the 16 applicants found by the court of appeals to have been the subjects of individual discrimination, only two were subjected to the "vague and subjective criteria," the "standardless hiring process," the evaluation by 23 principals, all white, to which the criticism of Hazelwood's hiring procedure (see, *e.g.*, Pet. App. B 13b-14b; Gov't Br. 33-37) is directed. During the same period 16 blacks were subjected to the same procedures and hired.

[9] The number of black applicants who were interviewed is known with some precision. See pp. 5-6, *supra*, and Addendum B to this reply brief.

3. The Cases of 16 Rejected Applicants Do Not Establish Discrimination.

We note at the outset that the Government no longer contends, as it did in opposing certiorari (Br. in Opp. 8), that the court of appeals' "findings" as to the 16 would, without the aid of any statistical data, be sufficient to support a finding that Hazelwood had engaged in a pattern or practice of discrimination in violation of Title VII. We said in our opening brief that the findings as to the 16 are inexplicable except on the assumption that a pattern or practice of discrimination had been otherwise proved. Tested against the standard of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the cases of the 16 do not, standing by themselves, prove or indicate a pattern or practice of discrimination. [10] Indeed, those cases cannot even buttress the statistical workforce evidence as the court of appeals said that they did, because they do not involve any discrimination whatever.

The Government has shown only that Hazelwood did not offer interviews to 14 black applicants whose paper credentials did not render them ineligible for interview referrals, and that Hazelwood hired other persons instead of two black applicants whom it did interview. The 14 were excluded by operation of a virtually mechanical, neutral practice, described above, and the remaining two were excluded by operation of an equally neutral (*i.e.*, not racially linked) legitimate evaluation process.

[10] Of course, absent a finding of a pattern or practice of discrimination, the court was powerless to award relief to the 16 applicants — or anyone else — in this action brought by the Attorney General under § 707 of the Civil Rights Act, 42 U.S.C. § 2000e-6. The court of appeals may have omitted to note this distinction, referring to the *applicants* (rather than the Government) as having "established a prima facie case of discrimination" (Pet. App. B 17b; see also *id.*, 20b).

The proposition — endorsed by the court of appeals and by the Government (Pet. App. B 16b-17b; Gov't Br. 42-43) — that the 14 are, as a matter of law, "qualified" for employment by Hazelwood under the *McDonnell Douglas* rule, is without merit. At most, these individuals are (or were) "qualified" for an interview — or, more correctly, "qualified" for the same chance to be interviewed as was accorded to applicants generally. Neither these 14 nor many other applicants were interviewed. Assuming *arguendo* that under *McDonnell Douglas* such evidence alone constitutes a prima facie case,[11] then all that is necessary to rebut that prima facie case is a showing that the 14 were denied interviews by a "legitimate nondiscriminatory" process. *McDonnell Douglas Corp.* v. *Green*, *supra* at 802. As we have explained in some detail (Pet. Br. 61-73), the record created at trial amply makes that showing.

The cases of Carson and Ellis — the two black applicants who were interviewed but not hired — raise only the issue whether Hazelwood's interview-and-evaluation process operated fairly to exclude them from employment. These two were rejected because they were not the "best qualified" applicants for the positions for which they were interviewed.[12]

[11] In our view, even the basic elements of a prima facie case have really not been presented as to these 14. An applicant is entitled to no more than a fair chance at selection for an interview. There is no evidence at all that these 14 were denied that chance, and to evaluate their treatment on the basis of whether they actually received an interview is to assume that they should have been interviewed. However, the analysis set forth in the text, which is perhaps too generous to the party attempting to show discrimination, serves equally well to negate the possibility that discrimination could legitimately have been found here.

[12] Carson was interviewed for one job, Ellis for two. The Government persists, in its brief, in describing these applicants as having been in competition for all positions opening in their areas of interest after their applications reached Hazelwood. This, of course, is not how the referral system worked. As we explained in our opening brief (at pp. 77-78), (continued)

It is our view that neither can be considered "qualified" for employment within the meaning of *McDonnell Douglas* since judgmental factors beyond mere paper credentials are legitimately a part of the process of hiring professionals. But even assuming *arguendo* that they can be considered "qualified," then any prima facie case of discrimination depending on that foundation was rebutted by evidence — amply set forth in the Government's own case — that the process by which they were found not the "best qualified" was valid and not racially-linked. Under the *McDonnell Douglas* rule, the Government could perhaps have attempted to rebut that showing with proof that Hazelwood's evaluation process was a mere pretext for discrimination; but the Government did not attempt to do so, and could not have done so successfully where 70 percent of blacks who are interviewed succeed in the process.

4. The Comparative Workforce Statistics Relied On By The Court Of Appeals Are Meaningless.

So we are left with the workforce statistics. They are different from the other categories of evidence we have discussed. If they showed what it is urged that they showed, they might, standing alone, prove a case of a pattern or practice of discrimination; they are not of such a nature that they merely buttress or cast light on some other aspect of the Government's evidentiary showing. But, apart from

[12] (continued)
Carson failed in his one round of competition (for a position as a high school English teacher). Carson was not in competition for the half dozen similar positions that opened subsequently.

Ellis was afforded two interviews but was not considered the "best qualified" applicant by either interviewer. She was rated "below average" in at least one respect by each. (Pl. Ex. 12.) The Government does not quarrel with our demonstration (Pet. Br. 78 n.54) that the court of appeals, in holding Ellis "qualified" by virtue of her supposed lengthy experience, misread the record and overstated her experience.

the fact that the best of workforce statistics cannot be relied on to prove a case of discrimination when better, more direct evidence of the treatment by the employer of black and nonblack job applicants is available and contradicts the statistics, the workforce statistics here are seriously flawed.

The Government simply asserts, with no basis whatever in the record, that, if there were no discrimination, the racial composition of Hazelwood's faculty would resemble that of the population of employed teachers living in the combined St. Louis City-County area. (Gov't Br. 21.) That is not the case.

The City of St. Louis, which employs about one fourth of the area's teachers, dominates hiring in the area. The City adheres to a racial hiring quota designed to cause the composition of the City's faculty to resemble the racial makeup of the City's school enrollment or overall population. We demonstrated in our opening brief (at pp. 52-55) that the inevitable effect of the City's practices is to distort the area workforce statistics and to divert eligible blacks who might otherwise be available for employment in suburban jurisdictions such as Hazelwood. The 15 percent black proportion of the supposedly relevant labor market is meaningless in light of the City's successful policy of maintaining a 50-50 racial balance on its faculty. Comparison with the area workforce of Hazelwood's two percent black faculty proves nothing.

* * *

The Government misconceives the whole burden of our argument in support of our proposed negative answer to the second question presented when it asserts that we have engaged in the advocate's old trick of separating out each category of evidence and arguing that none standing by itself would be sufficient to support the challenged judgment. (Gov't Br. 43-47.) Our purpose in analyzing the

evidence has been quite different. It has been to show that the comparative workforce statistics were and in the nature of things had to be what the court of appeals relied upon in finding a violation of Title VII because none of the other evidence could, standing alone or in combination, have supported a finding of a pattern or practice of discrimination. We have also argued that the comparative workforce statistics were flawed. But, much more important, we have shown that the workforce comparison, even if valid on its own terms, cannot lawfully sustain a holding that Title VII was violated because other, more telling evidence — reliable direct evidence of the relative treatment of actual black and nonblack job applicants — was available and told a story the precise contrary of the story of discrimination derived by the court of appeals from the workforce statistics.

In large part this better evidence of applicant flow was developed by the Government and came in as a part of its case. Petitioners supplied only the figures as to overall annual applications and hirings. All of the data were of record. Petitioners in this Court have not done anything remotely like presenting the kind of new statistical case that the majority of the Court in *Castaneda* v. *Partida*, No. 75-1552, decided March 23, 1977, slip op. at 7 n.8, declined to consider. Petitioners present here no new assumptions untested below, which is what the Court saw in *Castaneda*. Petitioners' data are from the record, and the case they support is the case that petitioners have advanced from the beginning — that they did not discriminate against black applicants for teaching positions in violation of Title VII and there is no evidence in the record that they did.

II. HAZELWOOD WAS FOUND TO HAVE VIOLATED TITLE VII ON ACCOUNT OF NON-PURPOSEFUL DISCRIMINATION, AND THE CONSTITUTIONALITY OF TITLE VII AS SO APPLIED CANNOT BE SUSTAINED UNDER ANY GRANT OF CONGRESSIONAL POWER.

The Government and the amici respond to the constitutional question we have presented — whether Section 5 of the Fourteenth Amendment empowers Congress to prohibit by Title VII employment practices of a state agency in the absence of proof of purposeful discrimination on the basis of race — principally by arguing that the issue is not presented in this case. They contend that our constitutional question is erroneously premised because the court of appeals could and did find that Hazelwood purposefully discriminated against applicants on the basis of race. They also suggest that the Court can avoid the Fourteenth Amendment issue here by upholding the application of Title VII to Hazelwood under the Commerce Clause or, in the case of the amici but not the Government, the Thirteenth Amendment.[13] We submit below that the first argument, which seeks to characterize this case as one involving purposeful discrimination, is based on a faulty reading of the opinion of the court of appeals and the record. Thereafter we urge that neither the Thirteenth Amendment nor the Commerce Clause can be invoked to uphold the application of Title VII to Hazelwood in this case, and conclude by responding briefly to the limited points that the Government has made with respect to the merits of the Fourteenth Amendment issue.

[13] One of the amici contends that Title VII can be upheld as applied to Hazelwood here under Congress' spending power. (LDF Br. 23-24.) The Government has declined to endorse this contention, doubtless because neither Title VII in general, nor this case in particular, involves any issue about the denial of federal funding. The spending power rationale asserted here would have been just as appropriate (or inappropriate) in National League of Cities v. Usery, 426 U.S. 833 (1976), where this Court did not see fit to mention it.

As the Government points out, it litigated this case "[f]rom the outset . . . as a case of intentional discrimination." (Gov't Br. 48.) Moreover, the court of appeals specifically noted that Hazelwood was charged under the Fourteenth Amendment, as well as under Title VII (Pet. App. B 1b), and made clear its understanding that invidious, purposeful discrimination is something quite different from conduct that, though neutral in terms of racial motivation, may violate Title VII in some contexts because it produces a disparate racial effect.[14] Nevertheless, the court of appeals did not discuss anywhere in its opinion the proof required to establish constitutionally prohibited discrimination, and never once described as "invidious," "intentional" or "purposeful" the Title VII discrimination by Hazelwood that it found to have been established at trial. It found no Fourteenth Amendment violation. The court of appeals, in short, specifically declined to find that Hazelwood's employment practices were racially motivated.

The Government, however, now argues, in effect, that wherever "discrimination" appears in the opinion of the court of appeals, this Court should read instead "purposeful invidious discrimination." (Gov't Br. 51.) The sole support claimed for this interpretation of the opinion below is the observation therein by Mr. Justice Clark for the divided court that the meager number of black teachers at Hazelwood was, in the view of the majority of the panel, "more than mere coincidence." (Gov't Br. 48.) If this is indeed the point at which the court drew the conclusion of purpose that the Government attributes to it, it is strangely indirect for a judge not noted for expressing himself by indirection.

[14] The court of appeals' remedial instructions to the district court included a specific reference to employment practices that have "the purpose *or effect* of discriminating against any individual because of his race or color." (Pet. App. B 26b) (emphasis supplied).

There is no reason not to believe that the holding below was carefully, deliberately stated by the court of appeals to preclude the interpretation that the Government now seeks to give it — and not just because logic compels that conclusion on the face of the opinion itself. The record, as we have shown, cannot sustain any finding of a pattern or practice of discrimination by Hazelwood in violation of Title VII — even if the Act should be construed to encompass such a violation in the absence of proof that Hazelwood purposefully discriminated against applicants on the basis of race. If, as the Government urges, this case is treated under the statute exclusively as one charging purposeful discrimination, it requires proof of the additional element of purposefulness. Certainly a record that cannot sustain a finding of a violation of Title VII in the absence of proof of intentional discrimination cannot do so against the more rigorous standard, and we think that the court of appeals would agree. (See also Pet. Br. 26-30.) The court of appeals not only did not but could not make the finding of racially motivated discrimination that the Government now urges on this Court as the basis of the opinion below. The constitutional issue is thus squarely presented.

The Government makes but fleeting reference to the Commerce Clause when discussing in its brief the constitutionality of Title VII as applied to Hazelwood, and it declines to adopt the claim of the amici that Title VII can be upheld under the Thirteenth Amendment.[15] The Government stresses that Congress intended its application of Title VII to state agencies as an exercise of congressional power under Section 5 of the Fourteenth Amendment.

[15] However broad Congress' authority "to determine what are the badges and the incidents of slavery" that may be prohibited under § 2 of the Thirteenth Amendment, Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968), this Court has never approved exercise of that power in circumstances that did not involve allegations that individuals had intentionally been accorded different treatment because of their race. *See, e.g.*, Jones v. Alfred H. Mayer Co., *supra*; McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976).

(Gov't Br. 55.) *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 453 n. 9 (1976). Even when referring to the Commerce Clause, the Government describes application of Title VII to the states as a "remedial" matter reflecting Congress' interest in ensuring vindication of Fourteenth Amendment rights. (Gov't Br. 57.) The nature and importance of Congress' interest in applying Title VII to state agencies, then, must be assessed in terms of the Fourteenth Amendment rights to which that interest relates.

There can accordingly be no argument here that, even if Title VII as construed by the court of appeals is not "appropriate legislation" to enforce the substantive prohibitions of the equal protection clause, the Act nevertheless reflects some congressional priority that may be pursued — at the cost of direct conflict with the exercise of state sovereignty — under the Commerce Clause. If Title VII cannot be upheld under Section 5, it cannot be sustained under the Commerce Clause.

A school district's interest in selecting as teachers those it considers best qualified — under standards that are nonracial and accordingly do not violate the equal protection clause — without regard to the resulting racial makeup of its faculties is unquestionably an "attribute of state sovereignty constitutionally insulated from congressional exercise of the commerce power under this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833" (Gov't Br. 57). The Government claims that there is no impermissible interference by Congress with the exercise of state sovereignty here because Hazelwood's "personnel expenditures remain totally self-determined," as do "the number of employees [Hazelwood] will hire, the functions they will perform, the hours they will work, [and] the wages they will be paid." (Gov't Br. 57.)

The Government does not respond to the most important argument that we make in our opening brief at pages 21-22 concerning the practical consequences that Title VII, as construed by the court of appeals, would necessarily have when applied to Hazelwood or any other school district that

might find itself with a faculty that did not match in racial makeup some supposed area workforce. In the present case it would displace Hazelwood's procedures for the hiring of its teachers. Enforcement of Title VII as construed below would have a dramatic effect on who will teach at Hazelwood or in any other school district similarly situated.

This impermissible displacement of Hazelwood's "freedom to structure [its] integral operations" would not occur because of some number of dollars that the school district must expend to bring itself into and maintain its compliance with Title VII, nor would it occur because of any effect on the number of teachers hired or their functions, hours or wages. If *National League of Cities* were whittled down to its particular facts in the manner suggested, which is the Government's implicit argument, that case of course could be distinguished from this one. But so to limit *National League of Cities* would deny the very constitutional rationale that impelled this Court to invalidate the statute that was there at issue in its application to state agencies. Neither the Government nor any of the amici suggests any reason why this fresh decision should be so promptly stripped of all but the scantest precedential force. Fundamental respect for state sovereignty is essential if our constitutional system is to operate effectively, and this bedrock principle cannot be squared with the significant disruption of public school systems that would necessarily result if Title VII could be applied to a school district in the absence of proof that it intentionally discriminated against certain applicants on account of race, sex or religion.

The issue then, is whether Title VII as applied here can be upheld under Section 5 of the Fourteenth Amendment.[16]

[16] We see no purpose served by speculation about how this Court should treat the provisions of the Equal Pay Act or the Age Discrimination in Employment Act, under the Fourteenth Amendment or any other constitutional provision, if and when those issues are presented to it. (See Gov't Br. 57 n.52 and App. B.)

We agree with the Government (Gov't Br. 54-57) that Section 5 empowers Congress to prohibit by Title VII racially motivated hiring practices of a state agency, but if that were a constitutional question it would not be posed in this case. The issue here, noted but not decided in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 n. 11 (1976), is whether Title VII can be sustained under Section 5 when a state agency is held to have violated the statute in the absence of findings or proof that the agency purposefully discriminated against applicants on the basis of race.

Analysis of the issue is not advanced, as the Government seems to think it is (Gov't Br. 52-53), by invocation of the phrase "prima facie case." There is no magic to that bit of lawyers' Latin; it merely denotes such a case as, not answered, entitles the party making it to judgment. If the governing rule of law is, as under the Fourteenth Amendment, that the party is entitled to judgment only if purposeful discrimination is proved, then a prima facie case is made only if discriminatory purpose is shown directly or is the reasonable inference from facts proved. In *Castaneda* v. *Partida*, No. 75-1552, decided March 23, 1977, for example, the majority of the Court thought the only reasonable inference from the wholly unexplained discrepancy between the racial composition of the grand jury rolls and the racial composition of the population was a purpose to discriminate. Purpose to discriminate is not a necessary or even a fair inference from the statistical showing made here of disparate racial impact of hiring procedures, and tagging that showing as "prima facie" does not make the inference any fairer.

We are content with the argument on the Fourteenth Amendment issue stated in our opening brief at pages 31-44 but point out in addition that the legislative history to which the Government refers (Gov't Br. 53 n.48) does not respond to the evidence cited in our opening brief (at 38-40) to demonstrate Congress' understanding that the substantive

prohibitions of Title VII are no broader than those of the equal protection clause. The Government cites references to *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), in the legislative history of the 1972 amendments to Title VII, but these references show only that Congress understood *Griggs* as a case dealing with employment practices that perpetuated the effects of past discrimination. *See* S. Rep. No. 92-415, 92nd Cong., 1st Sess. 5, 14 (1971). Page nine of the cited Senate committee report indicates nothing more than Congress' concern that employees in both public and private sectors should have equal access to the *remedial* procedures included in Title VII.[17]

Assessment here of congressional power under Section 5 of the Fourteenth Amendment is not aided "by analogy to the congressional prohibitions of literacy tests . . ." (Gov't Br. 54 n.48), which were upheld under the Fifteenth Amendment's narrow prohibition of denial or abridgment of voting rights, following findings by both Congress and this Court that such

> "tests and devices have been instituted with the purpose of disenfranchising Negroes, have been framed in such a way as to facilitate this aim, and have been administered in a discriminatory fashion for many years." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 333-34 (1966) (footnote omitted).

As we point out at page 36 of our opening brief, *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), dispels any notion that the scope of Congress' power to enforce the equal protection clause can be defined by reference to congressional authority under the Fifteenth Amendment. In *Oregon* v. *Mitchell* a majority of the Court could not be mustered to

[17] Chandler v. Roudebush, 425 U.S. 840 (1976), also deals with the scope of remedial rights available under Title VII.

sustain under the Fourteenth Amendment a nationwide suspension of literacy tests that was upheld under the Fifteenth Amendment. Moreover, the application of Title VII to state agencies in 1972 was not based on congressional findings comparable in any way to those that the Court considered when first reviewing voting rights legislation in *South Carolina* v. *Katzenbach*.

CONCLUSION

For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals should be reversed.

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ADDENDUM A

Hiring Rate For Black Applicants

Plaintiff's Exhibit 49 contains the names of 54 persons alleged by the Government to have been unsuccessful applicants for the school years 1971-72, 1972-73, and 1973-74 (the "1971-74 period"). Of these, one (Carol Jackson) was hired, and one (Reid) was offered a job but declined it; neither renewed her application for a second year.

Of the remaining 52, eight applied for school year 1971-72,[1] 21 applied for the first time for 1972-73, and 23 applied for the first time for 1973-74.

Of the 21 who first applied for the 1972-73 school year, four (Carson, Downs, Palmer and Roach) are known not to have renewed their applications for 1973-74. Although there is reason to believe that some of the others also did not renew for a second year, let us assume that all of them in fact did so.[2]

Let us assume further that all the known 1971-72 applicants also submitted a second application in a subsequent year.[3] Finally, let us assume that the known ap-

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[1] The eight 1971-72 applicants are Gray, Hauk, Hayes, Howell, Kincaid, Carolyn Thomas, Rosa Thompson and Jerome Trotter. Jerome Trotter probably applied in 1970, not 1971, but his testimony is ambiguous. (Tr. 195-99.)

[2] This assumption unquestionably exaggerates the number of applicants who renewed. The evidence shows that five (Edmond, Ellis, Jones, Mary Wilson and Robert Wilson) did renew their applications or reapplied for 1973-74. But it seems likely that several others (*e.g.*, Alexis Smith and Triplett) did not renew; the silence of the Government's evidence as to them, in view of the other evidence presented, suggests nonrenewal. And there is simply no information as to the remainder, although it is known that several found other teaching jobs and thus may have had no reason to keep their Hazelwood applications current.

[3] The evidence is that Kincaid applied again for 1972-73 (but not 1973-74) and that Howell applied again for 1973-74 (but not 1972-73). There is no evidence as to the others.

plicants for 1971-72 are only one half the total number of unsuccessful black applicants for that year, and that *all* the unsuccessful black applicants for 1971-72 renewed their applications or reapplied in a subsequent year.[4]

On the basis of the foregoing, the calculations as to the success rate of black applicants (Pet. Br. 47-49) would be revised as follows:

Number of Applications Submitted by Black Applicants, 1971-72 Through 1973-74:

52 identified unsuccessful applicants

17 applicants who received job offers

17 renewed applications presumed to have been submitted by identified applicants who first applied for 1972-73

8 renewed applications presumed to have been submitted by identified applicants who first applied for 1971-72

8 applications hypothetically submitted by applicants, not identified at trial, for 1971-72

8 renewed applications submitted for subsequent years by the eight hypothetical 1971-72 applicants, not identified at trial

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110 Total

Thus, the 17 who received job offers constituted not less than 15.5 percent of black applicants (*i.e.*, 17 divided by 110). Even if there were not 110 but *twice* that many black

[4] In our opening brief (at p. 48) we performed a similar calculation using 30 as the number of unidentified hypothetical black applicants for 1971-72. This seems too high for use in a realistic analysis. The eight known applicants from that year are probably the only ones of the year's applicants to renew for a subsequer ' year (any other renewed applications would have been spotted when Hazelwood's files were reviewed in 1972 and 1973); and our governing assumption for the present calculations is that all unsuccessful applicants reapplied.

applicants, the black hiring rate for the 1971-74 period would be not less than 7.7 percent (*i.e.*, 17 divided by 220).

The overall hiring rate for all applicants for 1971-72 and 1972-73 combined was 9.4 percent. (Pet. Br. 47.) The exact figure for 1973-74 is not known, but on the basis of the record statistics, it is around 5.3 percent (123 divided by 2300) (Pet. Br. 47 n.14); on that basis, the overall three-year hiring rate is 8.2 percent (*i.e.*, 639 divided by 7800).[5]

Accordingly, even making the most exaggerated assumptions as to the number of unidentified black applicants and as to the number who renewed their applications for a second year, it is clear that the hiring rate for blacks over the 1971-74 period could not have been significantly less than that for applicants generally. And if more reasonable figures are used, it becomes apparent that the hiring rate for blacks was significantly *higher* than that for all applicants.

[5] The figure of 7800 total applicants may, of course, include some who are counted twice. But counting twice all blacks who may possibly have renewed their applications, as we have here, provides a proper comparative measure.

ADDENDUM B

Black Applicants Interviewed By Hazelwood

The Government introduced at trial the deposition testimony of the principals of Hazelwood's high school, its three junior high schools, and its 19 elementary schools. Each deponent was asked whether he had ever interviewed any black applicants, and, if so, for their names and for other identifying information. The aggregate of the principals' testimony is the following:

Hired:

1. Atkins, Norman, 1971 (Hedrick dep. 63-64)
2. Burroughs, former student teacher (Huss dep. 47-48; Fuqua dep. 12-13)
3. Carter, Timotheus, 1972 (Negri dep. 175)
4. Clark, (first name not stated), 1973 (Selby dep. 164)
5. Davis, Margaret, 1969 (Beckemeier dep. 192-93)
6. Gerst, Jean, 1972 (Huss dep. 40-44; Negri dep. 176)
7. Holmes, Bob (Fuqua dep. 13, 15-16)
8. Houston, Barbara, 1973 (Negri dep. 182)
9. Johnson, Anita (Fuqua dep. 13)
10. Lunt, Barbara (Fuqua dep. 13, 15-16)
11. Page, Ken, 1972 (Negri dep. 176)
12. Payne, Dorothy, 1969 or 1970 (Gilman dep. 133-34)
13. Pillow, Anita, 1973 (Selby dep. 163)
14. Ree, Gwendlyn, 1972 (Selby dep. 163)
15. Register, Marilyn, 1969-70 (Maddux dep. 76-77)
16. Sanders, Mattye, 1972 (Selby dep. 162)
17. Scott, Phyllis (Fuqua dep. 12-13)
18. Thomas, Olita (Fuqua dep. 13)
19. Watkins, Karen (Lofaro dep. 30)
20. Youngblood, Brenda, 1972 (Miller dep. 150-51)

Offer Made and Declined:

21. Reid, Sandra, 1973 (Berry dep. 56-59)

Recommended For Employment, But Did Not Become Certified and Therefore Was Not Hired:

22. Lewis, Margaret (Gilman dep. 134)

Not Hired:

23. Adamson, Rose, 1972 (Woods dep. 140-41)
24. Arps, (first name not stated), "6 or 7 years ago" (Selby dep. 164)
25. Ellis, Beverly, 1972 (Weaver dep. 8-10; Berry dep. 56-58)
26. Jackson, (first name not stated), 1973 (Sandy dep. 23)
27. Lewis, (first name not stated), "5 or 6 years ago" (Barger dep. 39-41)
28. Riggs, Alberta (Negri dep. 176-77, 183; Beckemeier dep. 195-97; Huss dep. 40-44)
29. Trotter, (first name not stated) (Gruender dep. 90-93; Stinson dep. 116-17)

Unidentified Persons (May duplicate each other and those listed above):

one, in addition to Ellis (Weaver dep. 8-10)

one (Jones dep. 127)

no more than two, in addition to Watkins (Lofaro dep. 30)

one (for a librarian position), in addition to Lewis (Barger dep. 39-40)

one, several years ago (Bridges dep. 48)

one, 1971-72 (Mullen dep. 102-03)

unknown number (Fox dep. 9)